

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2379/2dn
JEO:jlg:km

March 10, 1999

This redraft takes the approach to s. 948.05, stats., suggested by Attorney Thomas J. Balistreri at DOJ. Specifically, it does the following:

1. The draft renumbers s. 948.05 (1) (c), stats., into a new subsection. *Zarnke* affected all of the acts proscribed under s. 948.05 (1) (c), stats., *except* for the acts of producing or performing in sexually explicit material. By renumbering the entire paragraph, those two acts will now be covered by the requirement that the state prove the defendant knew that the child was under the age of 18. As Attorney Balistreri points out, people producing or performing in sexually explicit material may not have face-to-face contact with the minor, and thus prosecutions under a remnant of s. 948.05 (1) (c), stats., that covers only those acts may run into the same problem encountered in *Zarnke*. Are there acts under s. 948.05 (1) (a) or (b), stats., where the defendant may not necessarily have face-to-face contact with the child engaged in the sexually explicit conduct? If so, do they need to be added to proposed s. 948.05 (1m)? (Or are they saved by the change in the affirmative defense mentioned below in item 2?)

2. The draft eliminates the language in the affirmative defense provision that said a person had a defense only if the child showed some documentary evidence establishing or purporting to establish that he or she was 18 or older. Thus, a person will now have a defense by showing that he or she had reasonable cause to believe that the child had attained the age of 18. *Zarnke* held that the affirmative defense could not save a prosecution where the defendant did not personally meet the child because in such a situation the defendant could not establish that the child showed documentary evidence of age. Accordingly, does the draft need to both: a) require the state to prove the defendant's knowledge for acts covered under s. 948.05 (1) (c), stats.; *and* b) eliminate the documentary evidence of age element of the affirmative defense, or would doing just one or the other suffice?

Please let me know if you have any questions or changes.

Jefren E. Olsen
Legislative Attorney
Phone: (608) 266-8906
E-mail: Jefren.Olsen@legis.state.wi.us